

## TO: Water Quality Standards Informal Advisory Group

I have reviewed the **materials** for the meeting on **April 8, 2005**, and have the **following comments to offer**. In general, I concur with and support the comments of Sean O'Keefe of Alexander & Baldwin, Inc., dated April 1, 2005. Additionally, I would like to reinforce several of his points as follows:

1. The agricultural and construction industries will have to meet a *higher standard* for soil runoff discharges into surface waters of any salinity. Inclusion of silt and clay as an "objectionable bottom deposit" in HAR 11-54-4(a)(1) effectively *renders meaningless* the exception for soil particles resulting from erosion in HAR 11-4-4(a)(6) [old 11-54-4(c)].
2. The new definitions such as "reference sites" and "sample size" in HAR 11-54-1 are *unnecessary and unclear*, and should be deleted. Similarly, there does not appear to be any meaningful purpose to assigning "1" and "0" scoring criteria in lieu of simple statements for samplers, and this change at 11-54-4(a) should be deleted.
3. Although the Deputy Director's version of the Rationale for the aquatic pesticide amendment is quite different from that of the Advisory Group Team, both versions provide a sound evaluation of the basis for the change to the regulation. However, I prefer the *more complete coverage* of the legal [judicial] history in the Advisory Group version.
4. I prefer the Deputy Director's version of the actual aquatic pesticide amendment at HAR 11-54-4(d)[e]), but with paragraph (4) *amended* to read "(4) Otherwise in compliance with Hawaii Administrative Rules Chapter 11-55," for the reasons given in Sean O'Keefe's comments.
5. It is *questionable* whether the proposed Appendix M to HAR Chapter 11-55 is needed. However, if the amendment goes forward, it should contain language such as suggested by Sean O'Keefe (at 19(a) of his comments) to clarify at Appendix M section 1(a) that private entities potentially covered by the NPDES permit are not obligated to obtain permit coverage unless mandated by the Clean Water Act, HRS Chapter 342D, and HAR Chapter 11-55. I am also concerned that the limitation of coverage at sections 2(a) and (c), by the Director's discretion to determine appropriateness of continued regulation and control by general permit, and by discretionary authority to require individual permits, seems to *defeat the purpose* of having a general permit.
6. I am also concerned by the limitation at section 1(a)(2) of proposed Appendix M on the active ingredients in aquatic pesticides. If the pesticide is an EPA-registered chemical licensed by the Department of Agriculture to certified applicators, *where is the DOH jurisdiction* to interfere in this manner?

7. There does not appear to be a definition of "pollutant" in the rules, although the term plays a significant role in the proposed amendments. But the definition of "water pollutant" in HRS 342D-1 is much broader than, and includes, the definition of "waste" which "pollutant" would replace in the rules. As Sean O'Keefe points out, the proposed change is *far more restrictive* than the current language, and is *not justified* in the Rationale. At a minimum, the aquatic pesticide exception "except when in compliance with section 11-54-4(d)[e]" should be inserted into the prohibition against "discharge of any pollutant" at 11-54-3(b)(1) and (b)(2) as well as at 11-54-5.1(a)(2)(D) and 11-54-5.2(a).

Paul J. Schwind, Esq.  
Director of Research and Legal Affairs  
Land Use Research Foundation of Hawaii  
700 Bishop Street, Suite 1928  
Honolulu, HI 96813  
Tel: (808) 521-4717 Fax: (808) 536-0132